judgment

THE HAGUE DISTRICT COURT

Commercial bench

case list number / cause list number: C/09/529140 / HA ZA 17-315

Judgment of 14 November 2018

in the case of

THE REPUBLIC OF INDIA (New Delhi),
claimant,
counsel: T.L. Claassens of Rotterdam,

v

1. **CC/DEVAS (MAURITIUS) LTD.** (Port Louis, Mauritius),
2. **DEVAS EMPLOYEES MAURITIUS PRIVATE LTD** (Port Louis, Mauritius),
3. **TELCOM DEVAS MAURITIUS LIMITED** (Port Louis, Mauritius),

defendants,
counsel: G.J. Meijer of Amsterdam.

In what follows below, the parties are referred to as India and CC/Devas, Devas Employees and Telcom Devas. The defendants are referred to jointly as Devas et al.

1. The proceedings

1.1. The course of the proceedings is evidenced by:
- the summons of 27 October 2016 with exhibits 1 to 109;
- the statement of defence with exhibits G-1 to G-55;
- the interim judgment of 11 October 2017 ordering a post-statement hearing;
- the submission on the part of India with exhibits 110 to 122;
- the submission on the part of Devas et al. with exhibits 56A, 56B and 56C;
- the submission on the part of India with exhibit 123;
- the official court record of the parties' appearance that took place on 30 March 2018.

1.2. With the parties' consent the official court record was drafted in their absence. The parties were given the opportunity to make comments about the official court record in so far as this concerned errors of fact. In a fax of 26 April 2018 India made use of this opportunity as did Devas et al. in a letter of the same date. The official court record will be read having regard to the additions stated and the observations made by the parties.

1.3. Judgment was finally determined.

2. **The facts**

2.1. On 20 June 2000 a bilateral investment treaty (the "BIT") came into effect between India and the Republic of Mauritius ("Mauritius"). The BIT's purpose is to protect investments of Mauritian investors in India and of Indian investors in Mauritius. Article 8, BIT provides for arbitration for the resolution of disputes.

2.2. Devas et al. are the (indirect) shareholders of an Indian company called Devas Multimedia Private Limited ("Devas"). Devas et al. are companies registered in Mauritius. Antrix Corporation Limited ("Antrix") is the commercial branch of the Indian Space Research Organization ("ISRO"), the business of which is the exploitation of Indian satellites.

2.3. On 28 January 2005 Devas concluded an agreement with Antrix with reference to the lease of 70 MHz capacity of the S-band for a twelve year period with the option of extension (the "Devas Contract"). For this purpose transponders were to be based on two satellites that were still to be developed. Devas wished to use the satellites and the accompanying spectrum, together with a network of transmission masts that it was to develop, for offering to its customers in India audio-visual broadcasts and broadband wireless access (the "Devas Services"). In the 2005-2010 period, Devas, in collaboration with, amongst others, Antrix and ISRO, worked on preparing these services.

2.4. On 17 February 2011 the Cabinet Committee on Security - consisting of the Prime Minister and the Ministers of Defence, Home Affairs, Foreign Affairs and Finance of India - which was competent to take decisions concerning defence and internal and external security (the "CCS"), decided that the Devas Contract had to be terminated. Prior to this decision a variety of governmental bodies and commissions had provided advice.

The press release of that same date concerning the CCS decision reads as follows:

> "(…)
> *Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.*
>
> *In light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the* [Devas Contract, addition by the court] *shall be annulled forthwith*."

2.5. On 25 February 2011 Antrix formally notified Devas of the termination of the Devas Contract.

2.6. On 3 July 2012, based on, amongst other things, Article 8, BIT, Devas et al. filed arbitration proceedings against India (the "Arbitration Proceedings"). Mr. David R. Haigh, The Honourable Shri Justice Anil Dev Singh and The Honourable Marc Lalonde (who was also the president) constituted the arbitral tribunal (the "Tribunal"). The arbitration was seated in The Hague.

2.7. In so far as is material to the adjudication in this action in set-aside the course of the Arbitration Proceedings was as follows:

- on 1 July 2013 Devas et al. lodged a statement of claim;
- on 2 December 2013 India lodged a statement of defence (the "Statement of Defence");
- on 18 March 2014 Devas et al. lodged a Statement of Reply on Jurisdiction and Liability;
- on 1 July 2014 India lodged a rejoinder (the "Rejoinder");
- the hearing (the "Hearing") took place between 1 and 5 September 2014 in the Peace Palace in The Hague; and
- after the Hearing India inserted a number of new documents into the case, in respect of which the parties then conducted a debate in writing.

2.8. In a Partial Award of 25 July 2016 (the "Partial Award") the Tribunal took the following decisions:

(a) Unanimously, that the Claimants' claims relate to an "investment" protected under the Treaty;
(b) Unanimously, that the notice of termination of the Devas Agreement sent by Antrix to Devas constituted an act of State attributable to the Respondent;
(c) By majority, that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas Agreement was in part directed to the protection of the Respondent's essential security interests;
(d) By majority, that the Respondent has expropriated the Claimants' investment insofar as the Respondent's decision to annul the Devas Agreement was in part motivated by considerations other than the protection of the Respondent's essential security interests;
(e) By majority, that the protection of essential security interests accounts for 60% of the Respondent's decision to annul the Devas Agreement, and that the compensation owed by the Respondent to the Claimants for the expropriation of their investment shall therefore be limited to 40% of the value of that investment;
(f) Unanimously, that the Respondent has breached its obligation to accord fair and equitable treatment to the Claimants between July 2, 2010 and February 17, 2011.
(g) Unanimously, that the Claimants' other claims shall be dismissed.
(h) Unanimously, that any decision regarding the quantification of compensation or damages, as well as any decision regarding the allocation of the costs of arbitration, shall be reserved for a later stage of the proceedings.

The Arbitration Proceedings were then pursued with respect to the quantum of damages.

2.9. On 28 July 2016 the Partial Award was lodged with the The Hague District Court.

2.10. On 11 August 2016 the Central Bureau of Investigation of the Indian Registrar of Companies, Income Tax Authorities (the "CBI") lodged a charge sheet so as to commence criminal proceedings against former Indian civil servants who had approved the Devas Contract as well as against Devas and some of its former and current directors (the "Charge Sheet").

3. The dispute

3.1. India seeks the setting aside of the Partial Award between India as Respondent and Devas et al. as Claimants, together with an order directing Devas et al. to bear the costs. India has grouped its objections to the Partial Award and, by extension, the grounds for set-aside around three themes: (i) the investments of Devas et al. are to be ranked as pre-investments that do not enjoy BIT protection; (ii) the decision to terminate the Devas Contract was made on the grounds of essential security interests, so barring the payment of damages; and (iii) the Charge Sheet (or the facts supporting it) cause the Devas Contract to be null.

3.2. Devas et al. have put forward a defence.

3.3. To the extent material, the parties' claims are examined in greater detail below.

4. Adjudication

Introduction

4.1. The default position governing this adjudication is that, according to established case law, a state court is to observe restraint when investigating whether there exists a ground for setting aside an arbitral award. A ground for set-aside may not be used as an appeal in disguise. The common interest in an effectively functioning arbitral system of justice furthermore demands that only in egregious cases are state courts to intervene in arbitral decisions (compare Supreme Court 17 January 2003, *NJ* 2004, 384 and Supreme Court 9 January 2004, AV 2005, 190).

4.2. This Court will evaluate the grounds for set-aside by reference to the three main themes put forward by India. To this end, for each main theme the core grievance will be formulated after which, to the extent material to this adjudication, the relevant sections from the BIT and from the Partial Award will be cited. This Court will then examine the grounds for set-aside put forward by India. It will do this first by setting out the assessment criteria, then India's propositions, after which an adjudication is performed, in which context the defence of Devas et al. will, to the extent necessary, play a part.

(1) Pre-investment

Introduction

4.3. In the first place, India has argued that Devas' activities only rank as pre-investment and do not rank as a qualifying investment within the meaning of Article 1(1)(a), BIT. A pre-investment falls outside the scope of the BIT and does not enjoy BIT protection including the provision in the BIT concerning arbitration. India claims that that which is relevant to the "pre-investment question" are not the investments which Devas et al. claim to have and to which the Tribunal directed itself, but in lieu thereof, whether Devas had an acquired right - which had sustained prejudice by virtue of governmental actions – to roll out the Devas Services.

4.4. Article 1(1)(a), BIT provides the following description of an investment:

""investment" means every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made, and in particular, though not exclusively, includes:

> *(i) movable and immovable property as well as other rights in rem such as mortgages, liens or pledges;*
> *(ii) shares, debentures and any other form of participation in a company;*
> *(iii) claims to money, or to any performance under contract having an economic value;*
> *(iv) intellectual property rights, goodwill, technical processes, knowhow, copyrights, trade-+marks, trade-names and patents in accordance with the relevant laws of the respective Contracting Parties;*
> *(v) business concession conferred by law or under contract, including any concessions to search for, extract or exploit natural resources.*"

4.5. In the Arbitration Proceedings, just as it did in these setting-aside proceedings, India has claimed that prior to the exploitation of the satellites and the accompanying frequencies Devas still had to obtain a licence from the Wireless Planning and Coordination Wing of the Department of Telecommunications (the "WPC licence"). When the Devas Contract was terminated in February 2011, Devas in fact still had no WPC licence. Devas had never obtained an undertaking or guarantee that the necessary licences would be provided. The lack of the WPC licence meant that Devas did not have any acquired rights and that it was still unable to offer the Devas Services. Devas' endeavours and the expenses it incurred in that context were therefore only pre-investments and were not investments enjoying BIT protection. In addition, India has argued that the Tribunal did not investigate the circumstance that the shares of Devas et al. in Devas were not expropriated and that therefore the partially indirect ownership of the assets of Devas were unaffected by India's governmental doings.

4.6. The Tribunal ruled as follows with respect to India's pre-investment defence:

"197. The Respondent [India, addition by the court] *does not dispute that the Claimants* [Devas et al., addition by the court] *are "investors" as defined under Article 1(1)(b) of the Treaty. (….)*

(…)

199. The Tribunal does not agree with the Respondent's contention that this case "only involves pre-investment activities that are outside the scope of protection afforded by [the Treaty]."

200. First, the Claimants' "shares, debentures and any other form of participation" in Devas and their indirect partial ownership of Devas business assets are assets "established or acquired under the relevant laws and regulations" of the Respondent. The Claimants received the approval of the Foreign Investment Promotion Board prior to their share subscriptions. (…) Moreover, the Tribunal has received no evidence to the effect that the Claimants' investment was not properly made "under the relevant laws and regulations".

201. Secondly, the Tribunal finds deficient the Respondent's argument that the Claimants' activities were "only pre-investment activities" because their investment was the alleged right to proceed with the Devas project pursuant to the Devas Agreement and because said project could not proceed without the WPC License, which Devas had no right to receive under the Devas Agreement.

202. The Devas Agreement was a valid contract between Devas and Antrix, a State-owned commercial corporation. It provided that Antrix was leasing to Devas space segment capacity on ISRO/Antrix S-band spacecraft. That leased capacity was on a non-pre-emptible basis, which meant that it could not be "utilized or repurposed for use by another party during life of the satellite and when this Agreement is effective and when Devas is not in default of its obligation".

203. The Agreement spelled out, among other provisions, the period of the lease and its terms and conditions, the contributions to be made as well as the circumstances and consequences of termination by each party, including in the case of force majeure. It also provided that it would become effective "on the date that ANTRIX is in receipt of all required approvals and communicates to DEVAS in writing regarding the same." (…)

204. On February 2, 2006, Antrix informed Devas that "it has received the necessary approval for building, launching and leasing capacity of S-band satellite, henceforth designated as INSAT- 4E," adding that it "is now in a position to go ahead with the building and launch of the INSAT 4-E spacecraft and lease the capacity on the same to Devas Multimedia Pvt. Ltd, as per Agreement No. Antrix/2003/DEVAS/2005 dated 28 January 2005."(…) The Agreement thereby became

effective on February 2, 2006.

205. Under the Agreement, the Claimants had to pay Upfront Capacity Reservation fees for the first and the second satellites. They paid the first instalments as per the Agreement on June 21, 2006 for the first satellite (GSAT-6)(…) and on June 18, 2007 (…) for the second satellite (GSAT-6A); these payments represented a total of about USD 13 million.

206. The Agreement also provided that Antrix was responsible for obtaining certain governmental authorizations(…) (which it did) and that Devas was responsible for obtaining others, with best effort support from Antrix273 (which it obtained for two licenses but did not reach the point of obtaining the third). But there is nothing in the Agreement which makes its validity dependent on Devas obtaining such permits, and at no time during the course of the Agreement or at the time of its annulment by Antrix was it argued by Antrix or any governmental authority that it was not in full effect. The non-issuance of a governmental license may pertain to the quantum of damages that may be claimed against the Respondent, if there was a breach of the Treaty, but it does not pertain to the validity of the Agreement or whether an investment was made by the Claimants.

207. The lease was binding on both Antrix and Devas and, by itself, it was an investment with significant value as was shown by the additional investment of some US$ 75 million in March 2008.(…)

(…)

210. The Tribunal therefore concludes that not only were the Claimants qualified investors under Article 1(1)(b) of the Treaty but that they also made qualifying investments under Article 1(1)(a) of that Treaty.

4.7. In the course of the Hearing, Devas et al. further contended that it was possible to offer a portion of the Devas Services without a WPC licence (what are called satellite-only-services). The Tribunal made the following findings with respect to satellite-only-services:

180. In this regard, the Respondent rejects the Claimants' argument that, had the satellites been launched, and assuming that the Devas Agreement had not been annulled, terrestrial operators would not have been able to use the S-band frequencies that Devas would have been using for its space-to-earth transmissions because of interference. (…)

181. The Respondent denies that Devas could have rolled out any satellite-based service without the WPC License. (…) According to the Respondent, Mr. Sethuraman detailed during the Hearing on Jurisdiction and Liability, how, even on the basis of the ISP and IPTV licenses, Devas would still have required additional licenses or additional telecommunications media to provide any kind of service,(…) and how, in any event, obtaining the WPC License would have been the last step of a well-structured process that Devas still had to follow. (…)

209. As to the Respondent's argument that the Claimants had no acquired right to obtain the WPC License and that they had no guarantee that they would obtain such license, it is a matter that does not go to the definition of investment for jurisdictional purpose but rather to the value of that investment. On the basis of the evidence received by the Tribunal, it is satisfied that, even without a WPC license, Devas could have rolled out satellite-only services. The Tribunal also notes that it has been satisfactorily established that, because of problems of interference, it would not have been possible for competing services to operate in the same spectrum. The lack of a WPC license would be a matter to be considered when deciding on the quantum of damages, if the Respondent is found in breach of the Treaty."

4.8. According to India, the Tribunal paid no attention to the documents which India inserted into the dispute after the Hearing and the witness statements on which it was relying that showed that a licence, or

a WPC licence, was indeed required.

4.9. With respect to pre-investment, India based its claim on the following grounds for set-aside: (i) there was no valid arbitration agreement because pre-investments fell outside of the BIT's protection; (ii) the Tribunal did not keep to its mandate; (iii) the Partial Award was devoid of reasoning; and (iv) the Partial Award entailed a breach of public policy. In what follows this Court will evaluate the setting-aside grounds put forward.

Ground for set-aside I-1: the Tribunal lacked jurisdiction on the basis of Article 1, BIT (Article 1065 paragraph 1 under a DCCP)

Assessment criteria

4.10. The BIT provides the basis for the arbitration agreement between the parties. Article 8(2), BIT incorporates an open offer of arbitration made by India to Mauritian investors. The written application, dated 3 July 2012, of Devas et al. for arbitration proceedings ranks as acceptance of that offer. This application completed the arbitration agreement. As for the question of whether there exists a valid arbitration agreement within the meaning of Articles 1020 paragraph 1 DCCP / 1065 paragraph 1 under a DCCP, and of the scope which such an arbitration agreement has, the Tribunal, and by extension a state court in an action to set-aside, is under a duty to investigate, amongst other things, whether the investment that is the subject of the dispute is protected by the BIT.

4.11. When making the evaluation the primary point is that the arbitral tribunal which has been appointed is under a duty to establish its own competence (Article 1052 paragraph 1 DCCP), but that the fundamental character of the right to recourse to state means means that the question of whether a valid arbitration agreement was concluded is one that is finally for the state court. This Court dismisses Devas et al.' proposition that, as a sovereign state, India is barred from relying on such a fundamental or human right and that for this reason in this case the lack of a valid arbitration agreement requires restrained investigation. The fundamental character of the right to recourse to a state court does not only concern private persons or private legal persons. The question of whether a valid arbitration agreement has been concluded touches on India's sovereignty and its administration of justice in a case such as this one. Based on a treaty a state may choose to waive part of its sovereignty but the question of whether in that particular case this in fact took place is so fundamental that this question may not be answered by arbitrators alone. In any case such a question must also be eligible for adjudication by the courts. This fundamental right also means that a court is not to practise restraint when investigating a claim seeking the setting aside of an arbitral award on the basis of Article 1065 paragraph 1, at a, DCCP (compare Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837 and The Hague Appeal Court 18 July 2017 under 5.2, ECLI:NL:GHDHA:2017: 2009).

Scope of the definition of 'investment'

4.12. With respect to the pre-investment question the parties are divided on the issue of whether the Tribunal correctly interpreted the term *investment* in Article 1(1)(a), BIT and paid heed to the correct circumstances and factors in its interpretation. As has been noted (4.3), for India the primary question is whether Devas had an acquired right - which had been prejudiced by governmental doings - to roll out the Devas Services. In paragraph numbers 25 and 26 of its pleading notes, India argued that it was "excellent and logical" for the Tribunal, in its interpretation, to have examined the content of Article 1(1)(a), BIT. As India sees it, the Tribunal had in fact applied the wording of the BIT in an excessively mechanical fashion and this had led to an interpretation which led to an outcome which was manifestly absurd or unreasonable. When adjudicating on the question of whether an investment obtains, the Tribunal ought not only to have looked at the definition of investment in the BIT but also at whether this definition falls within the objective definition of investment, so India contended. Contrariwise, Devas et al. have, in summary, argued that the definition of investment in the BIT is very broad and that the contents of the articles in the BIT regulating investment (Article 1(1)(a)) and the arbitration procedure (Article 8) are

clear.

4.13. The interpretation of the content of the BIT is to be performed by reference to the rules of construction set out in the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention"). The following provisions [translator: which are translated into Dutch in the judgment] are relevant:

"Article 31(1): *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

(...)

Article 32: *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable."

4.14. It follows from the logic of the Vienna Convention that for the purposes of interpreting the BIT and therefore for answering the question of whether the investments of Devas et al. rank as a protected investment, it is first of all the ordinary meaning, in the context and in the light of the BIT's object and purpose, that is to be determined. It is only if this interpretation is absurd or unreasonable that reliance may be made on supplementary means of interpretation.

4.15. This Court is of the view, a view that Devas et al. put forward, that what is to take precedence in the adjudication is that the definition of investment in the BIT is very broad and that many forms of investments fall under the scope of the BIT. Pursuant to the Devas Contract, Antrix and, respectively, ISRO bound themselves to build satellites in exchange for payment by Devas and Devas obtained unconditional and exclusive rights to a portion of the S-band for a twelve year period. This Court concurs with Devas et al. in finding that the right to a portion of the spectrum already represents a significant value and therefore ranks as an asset. In addition, it is not been disputed that Devas made a payment of USD 13 million and that Devas had obtained permission from India's Foreign Investment Promotion Board for the investments in question, whereby Devas' investment was recognised by the Indian authorities.

4.16. In the framework of the interpretation, India has pointed to the preamble to the BIT which states *'(...) that the promotion and protection of such investments will lend greater stimulation to the development of business initiatives and will increase prosperity in the territories of both Contracting Parties (...)'.* It is correct that the objective set out in the preamble is to play a part in the interpretation. However, if the terms in the BIT are to be construed in the context of its objective, then this interpretation does not lead to the conclusion that the investments of Devas et al. fall outside the scope of a qualifying investment. These were characterised by an intention to contribute to the economic welfare in India (in this case, by offering telecommunication services in India) that stretched over a lengthier period (in this case, a twelve year period with the possibility of an extension). A reasonable interpretation of this preamble is incompatible with India's approach that a qualifying investment only obtains as from the moment that this truly contributes to India's economy.

4.17. This Court is of the view that, based on the rules set out in Article 31(1) of the Vienna Convention and contrary to India's belief, the interpretation of the term investment does not therefore lead to a manifestly absurd or unreasonable result, with the result that this Court will not broach the interpretation of the BIT on the basis of supplementary means of interpretation. The sources outside of the BIT which India put forward in the context of construction will not be examined any further. As a

reasonable interpretation of Article 1(1)(a), BIT means that the use of a portion of the S-band ranks as a qualifying investment that falls within the scope of the BIT, the question of whether Devas could offer satellite-only-services ceases to be relevant to further adjudication. It may be that the circumstance that Devas did not have a WPC licence influences the value of the investments, as was found in the Partial Award, but the answer to this question is one that is to be reserved to the continuation of the Arbitration Proceedings and falls outside of the scope of these setting-aside proceedings. It is unclear whether, in the context of its reliance on the absence of an arbitration agreement, India wishes to argue that the participation or investment of Devas et al. does not qualify as an investment under the BIT. Irrespective of the above, with the broad definition of 'investment' in the BIT, many forms of investment fall under its scope, including '*shares, debentures and any other form of participation in a company'* (see 4.4.). Devas et al. are (indirect) shareholders in Devas who made investments in Devas. As the Tribunal found (Arbitral Award 200 and 208), these are circumstances that contribute to the conclusion that Devas et al. made qualifying investments under the BIT. In this action, India has not gainsaid the point that Devas et al. made significant investments in Devas.

4.18. The foregoing causes this Court to conclude that the set-aside sought on the basis of a lack of jurisdiction merits dismissal.

Ground for set-aside I-1: The Tribunal did not keep to its mandate (Article 1065 paragraph 1 under c DCCP)

4.19. Under Article 1065 paragraph 1 under c DCCP, an arbitral award may be set aside if the tribunal has not kept to its mandate. A breach of mandate obtains when, amongst other things, the tribunal breaches rules of procedure, whether or not statutory; makes an award that is greater or different from that which was sought; does not decide on claims or on essential defences; or where it adds erroneous facts or grounds in law in its decision which were not put forward by the parties or which differ from facts that were common ground between the parties. A setting-aside on the basis of breach of mandate may not operate as an appeal in disguise. This means that a setting-aside claim may only succeed if the breach of mandate is serious. This means that in its adjudication, a court is under a duty to practice restraint and may only proceed to set-aside in egregious cases (compare Supreme Court 17 January 2003, *NJ* 2004, 384).

4.20. India has contended that the Tribunal did not keep to its mandate and failed to take a decision on the following essential defences with respect to the pre-investment question: (i) it was not the shareholding of Devas et al. in Devas or the assets of Devas but the purported right to proceed further with the Devas Services that was pertinent to the adjudication; (ii) the activities of Devas and Devas et al. were pre-investments or developmental activities, a position that is supported by various authorities; and (iii) Devas could not offer any satellite services without a WPC licence.

4.21. This Court concurs with Devas et al. that the Tribunal indeed furnished a reasoned argument on all three defences set out above. With respect to that which is claimed under (i) and (ii), this Court finds that the Tribunal performed an extensive review of India's pre-investment defence in paragraph numbers 199 - 210 of the Arbitral Award (see paragraph 4.6). In its determination, the Tribunal specifically paid heed to the shareholding of Devas et al. and to the rights of Devas. In its award, an arbitral tribunal is under no duty to proceed to a substantive review of the precedents and case law put forward in the context of an essential defence. The mere circumstance that the Tribunal omitted such a review in this case cannot rank as a breach of mandate. With respect to that which was put forward under (iii), this Court finds that the Tribunal examined India's position about the satellite-only-services in paragraph number 209 of the Arbitral Award (see paragraph 4.7). In paragraph numbers 180 and 181 of the Arbitral Award (see paragraph 4.7) the Tribunal reproduced India's substantiation of its defence. It follows from the Arbitral Award that the Tribunal paid heed to the relevant propositions of India in its adjudication but ultimately found them not to be conclusive.

4.22. In the framework of a setting-aside claim on the basis of Article 1065 paragraph 1 under c

DCCP, a court, in its adjudication, may not pay heed to the content and validity of the reasoning supporting a decision about essential defences. In so far as India's propositions concern the content of the adjudication, this Court declines to review them. Given that the Tribunal performed a reasoned determination of India's essential defences that it has raised in this set-aside action and which it has itself ranked as essential, a ground warranting the setting aside of the Arbitral Award for breach of mandate is absent.

Ground for set-aside I-3: The Partial Award does not contain reasoning supporting various important findings (Article 1065 paragraph 1 under d DCCP)

4.23. Article 1065 paragraph 1 under d DCCP provides that the setting aside of an arbitral award may only be performed if reasoning is lacking. No setting-aside is possible in the case of invalid or flawed reasoning. After all, a state court lacks competence to investigate the content of an arbitral award: Article 1065 paragraph 1 under d DCCP (compare Supreme Court 9 January 2004, *NJ* 2005, 190). The absence of any reasoning must be equated with the case in which indeed grounds have been provided, but where the a valid explanation for the relevant decision cannot be identified in that reasoning. The courts are bound to apply this criterion with restraint, in the sense that the courts may only interfere in arbitral awards in egregious cases.

4.24. India has taken the position that the Tribunal passed over propositions of India with respect to the pre-investment question and has put forward five flaws in the reasoning. The Arbitral Tribunal failed to provide reasoning for the following: (i) why the shareholding of Devas et al. in Devas and their direct ownership in Devas were protected investments, although these shares were not taken away; (ii) why the Devas Contract was an investment of value; (iii) how the significant investments in Devas could alter the nature of the investment; (iv) why the lack of a WPC licence should only be pertinent to the value of the investment and not to the Tribunal's competence; and (v) why, as India contended, satellite-only-services could be offered without a WPC licence.

4.25. At paragraph numbers 199-210 (see paragraph 4.6) and paragraph numbers 180, 181 and 209 of the Arbitral Award (see paragraph 4.7), the Tribunal examined India's defence with respect to the pre-investment question, the shareholding and the investments of Devas et al. in Devas, the WPC licence and the satellite-only-services. Hence with respect to these parts, the Arbitral Award was reasoned and on this ground no set-aside of the Partial Award may be performed. Lack of reasoning may also obtain where a tribunal has failed to examine the parties' essential propositions. However, the duty to provide substantiation does not go so far as to oblige an arbitral tribunal to furnish a substantive response to all the parties' propositions in its award. In 4.20 - 4.22 this Court has already found that in its Arbitral Award the Tribunal examined those defences which India has ranked as essential. India has in fact failed to provide substantiation showing why the lack of reasoning it is claiming (in addition to the defences that have been adjudicated upon in 4.20 - 4.22 above) rank as essential defences or why these rank as egregious cases. India has failed to provide a sufficiency of substantiation on this part and for this reason no set-aside may be performed on the grounds of absence of reasoning.

Ground for set-aside I-4: The Partial Award and the way in which it has come about breaches public policy because the Tribunal breached India's fundamental right to adversarial proceedings (Article 1065 paragraph 1 under e DCCP)

4.26. Pursuant to Article 1065 paragraph 1 under e DCCP, an arbitral award may be set aside if the content or the manner in which it was reached is in breach of public policy, which breach includes the situation where the fundamental right to adversarial proceedings has been breached.

4.27. As substantiation of this part of its claim, India has contended that its right to adversarial proceedings was breached because the Partial Award does not include any discussion of: (i) India's proposition that the relevant investment in the pre-investment question was not the shareholding of Devas

et al. in Devas, but the purported right to proceed further with the Devas Services; (ii) various authoritative judgments about the pre-investment defence that India prayed in aid before the Tribunal; and (iii) the various items of evidence which India presented to the Tribunal that show that Devas could not supply any satellite-only-services at all without a WPC licence.

4.28. Concurring with Devas et al., this Court finds that that which India has put forward is to be ranked as reliance on an absence of reasoning and concerns neither the course of the proceedings nor a breach of the fundamental right to adversarial proceedings. An adjudication on this matter to India's disadvantage has already been given above at 4.24 - 4.25, finding that the alleged absence of reasoning does not hold. As India has not supplied any further substantiation supporting this part of its claim, it is dismissed on the grounds of insufficiency of substantiation.

(II) <u>Essential security interests</u>

Introduction

4.29. India has contended that it terminated the Devas Contract because India required the frequencies that it had leased to Devas for, in the main, military usage. This is the reason why the CCS decided to refuse commercial usage of the S-band and to reserve this space on the segment for the State of India *'having regard to the needs of the country's strategic requirements'.* India set out its requirements in great detail in the Arbitration Proceedings. These strategic requirements concerned to a great degree those of its armed forces, but also those of other security services such as the border police which needed to use the S-Band. All these requirements rank as essential security interests that cannot coexist with the Devas Contract.

4.30. In Article 11(3), BIT lays down the following about essential security interests:

"*(t)he provisions of this Agreement* [=BIT, addition of the court] *shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests (...).*"

4.31. India has taken the position that use of the S-Band for military or paramilitary usage ranks as an essential security interest, with the result that Article 11(3), BIT bars an award of damages.

4.32. The Partial Award set out the following findings about essential security interests:

370. Although the requests of the military for part of the S-band spectrum are large, the Tribunal notes that no specific allocation has been made by the Respondent, and the Tribunal cannot assume that such requests will be approved in full by the Respondent. All around the world, governments are faced every year with very large demands for funds for various projects from their military establishment and, just as regularly, governments grant only a percentage of such requests.

371. The Tribunal, by majority, therefore concludes that, although the CCS decision of 2011 appears to have been in part "directed to the protection of its essential security interests," that part remained undefined and several other objectives were included in that decision, which had nothing to do with national security. In the circumstances, the Tribunal rules that, although the Respondent was fully entitled to reassign the S-spectrum to non-commercial use, the part which was not reserved for military or paramilitary purposes would be subject to the provisions of Article 6 of the Treaty concerning

expropriation.

372. Moreover, in the present case, the request by the armed forces for the attribution of spectrum is spread over a number of years (up to 2022) and, looking at the past performance of the space program, it is extremely doubtful that the envisaged schedule could be realistic. In fact, the requirement of 17.5 MHZ up to 2012 had not even been allocated by the time of the launch of GSAT-6 in 2015.

373. On the basis of the evidence submitted to it as described above and bearing in mind that the Respondent had already reserved to itself 10% of the spectrum in question the Tribunal, by majority, is of the view that a reasonable allocation of spectrum directed to the protection of the Respondent's essential security interests would not exceed 60% of the S-band spectrum allocated to the Claimants [=Devas, addition of the court], *the remaining 40% being allocated for other public interest purposes and being subject to the expropriation conditions under Article 6 of the Treaty. It will be up to the Tribunal, in the next phase of this arbitral process (damages), to establish the compensation due to the Claimants in that respect."*

And the Tribunal then made the following rulings:

(...)

(c) By majority, that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas Agreement was in part directed to the protection of the Respondent's essential security interests;
(d) By majority, that the Respondent has expropriated the Claimants' investment insofar as the Respondent's decision to annul the Devas Agreement was in part motivated by considerations other than the protection of the Respondent's essential security interests;

(e) By majority, that the protection of essential security interests accounts for 60% of the Respondent's decision to annul the Devas Agreement, and that the compensation owed by the Respondent to the Claimants for the expropriation of their investment shall therefore be limited to 40% of the value of that investment;

4.33. In this action to set-aside, India is challenging the Tribunal's decision declaring it had jurisdiction for 40% (the "60/40 ruling"). This notion of a partial declaration of competence is in breach of the meaning of the wording of the BIT and in breach of the fundamental principles of treaty interpretation as well as being in breach of the objective and purpose of the BIT, so India contends. In addition, the Tribunal failed to provide any reason showing why the 60/40 ruling, which forms an essential part of the Partial Award, was reasonable. In addition, the position is that with its 60/40 ruling the Tribunal did not keep to its mandate, given that this finds no basis whatsoever in the indisputable facts and the evidence in the instant case. Lastly, there was a breach of the *audi et alteram partem* principle because the declaration of partial jurisdiction, lacking any precedent whatsoever, ranks as a surprise decision.

4.34. India has based its claim on the following grounds for set-aside: (i) a valid arbitration agreement was lacking; (ii) the Tribunal did not keep to its mandate; (iii) the Partial Award was devoid of reasoning; and (iv) the Partial Award incorporated a breach of public policy. In what follows this Court will evaluate the grounds for set-aside put forward.

Ground for set-aside II-1: The lack of a valid arbitration agreement (article 1065 paragraph 1 under a DCCP)

Assessment criteria
4.35. This Court refers to paragraph 4.11 (ground for set-aside I-1) for the applicable assessment criteria.

4.36. In these proceedings, the Tribunal's ruling declaring that it enjoyed 40% jurisdiction is challenged. Although the Tribunal's ruling declining competence with respect to the remaining 60% is directly connected to this, no setting aside of this ruling has been sought. (The (in)correctness of) this partial declaration of lack of competence therefore falls outside of the scope of this action to set-aside and is therefore not a subject on which this Court is bound to adjudicate.

Late reliance on the jurisdictional objection

4.37. The most far-reaching formal defence of Devas et al. is that not once did India claim in the Arbitration Proceedings that the presence of essential security interests fettered the Tribunal's jurisdiction such as to bar it from determining the question between the parties. India was under a duty to produce this jurisdictional objection prior to all defences in the Arbitration Proceedings and lastly in its Statement of Defence. As India failed to do this, in the instant proceedings Article 1052 DCCP read in conjunction with Article 1065 paragraph 2 DCCP bars it from further reliance on a lack of jurisdiction. According to Devas et al. in the instant action to set-aside, this Court is under a duty to pass over India's propositions in this regard. Countering this, during the hearing India argued that it had indeed put forward its reliance on essential security interests in the Arbitration Proceedings as a defence challenging jurisdiction.

4.38. This Court finds that the Tribunal understood India's propositions on essential security interests as being a defence challenging jurisdiction. At paragraph number 169 of the Partial Award, the Tribunal held: "*Secondly, the Respondent* [India, addition of the court] *submits that the Tribunal lacks jurisdiction over the claims in this case by operation of the "essential security interests" ("ESI") provision of the Treaty. The Claimants reject all of these objections and submit that the Tribunal has jurisdiction over its claims.*" In its decision under (c) the Tribunal also determined that: "*the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas Agreement was in part directed to the protection of the Respondent's essential security interests*."

4.39. Because the Tribunal understood both parties' propositions concerning essential security interests as a defence challenging jurisdiction, because jurisdiction was the subject of debate between the parties and because this was, as such, the object of a ruling by the Tribunal, there is no need to enter into the question of the point in time at which, in the Arbitration Proceedings, India explicitly appealed to the Tribunal's lack of jurisdiction on the grounds of essential security interests.

Essential security interests do not limit jurisdiction

4.40. It is not in dispute between the parties that Article 11(3), BIT provides that the BIT may not restrain a guest state, in this case India, from taking measures which are directed at the protection of its essential security interests. Furthermore, it is common ground between the parties that where essential security interests are at stake, India is not bound to offer financial compensation where an investment has been expropriated. In this action to set-aside, there is a dispute between the parties as to whether Article 11(3), BIT also ranks as a jurisdictional threshold clause. India takes the position that this is the case and that the Tribunal should have declined all jurisdiction because of essential security interests. Devas et al. contest this interpretation.

4.41. As found in paragraph 4.13, interpretation of the content of the BIT is to be performed by reference to the rules of interpretation set out in the Vienna Convention. Article 31(1) lays down that: *'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.''*

4.42. For the purposes of answering the question of whether a valid arbitration clause came into being, one must first examine the arbitration clause (Article 8, BIT). This article does not incorporate any reference whatsoever to Article 11(3), BIT. Nor does Article 11(3), BIT incorporate any reference to the arbitration clause or is a relationship created in some other fashion between essential security interests and the jurisdiction of arbitrators. For this reason, no points of anchorage can be found in the wording of the BIT supporting India's position that heed is to be paid to essential security interests when determining an

arbitral tribunal's jurisdiction.

4.43. As India correctly confirmed during the hearing (at paragraph numbers 99 to 102 of its pleading notes), the mere circumstance that the BIT does not incorporate any reference or cross-reference linking Articles 8 and 11(3), BIT is not of itself conclusive for the purposes of determining the interpretation of the arbitration clause and of answering the question of the Tribunal's jurisdiction. However, if, when interpreting, heed is paid to the object and purpose of the BIT consistent with the Vienna Convention rules of interpretation, no support may be found for a restriction on the Tribunal's jurisdiction. A reasonable interpretation of the arbitration clause means that this provision incorporates a broadly formulated open offer of arbitration given that *"any dispute between an investor of one Contracting Party* [here, Devas et al., addition of the court] *and another Contracting Party* [here India, addition of the court] *in relation to an investment"* may be the subject of arbitration. That the arbitration clause is not to be interpreted restrictively also follows from the purpose of the BIT. In the preamble to the BIT, the contracting parties formulated the purpose of the BIT as being that of '*creat[ing] favourable conditions for greater flow or investors of either Contracting Party* [India and Mauritius, addition of the court*] in the territory of the other Contracting Party'*. In so doing the contractual parties acknowledged that '*promotion and protection of such investment will lend greater stimulation of the development of business initiatives (...)'. [Translator: the text has not been correctly cited.]* The purpose of the BIT is therefore that of creating favourable conditions for investors, including the protection of these investments in arbitration proceedings. This purpose and the protection offered under the BIT are hard to reconcile with India's interpretation that specified points in dispute (here essential security interests) fall outside of the scope of adjudication by an arbitral tribunal without the BIT incorporating any explicit points of anchorage to that effect.

4.44. In support of its position, India also pointed to various precedents and national and international sources. This Court finds that these sources confirm India's position that a sovereign state is at liberty to determine whether national security is at issue and what matters are then necessary to protect that national security; and that an arbitral tribunal must for this reason exercise extreme restraint when ruling on reliance on essential security interests. However, none of these sources provides confirmation for India's position that an arbitral tribunal lacks jurisdiction if essential security interests are at issue.

4.45. At the hearing, the parties engaged in a lengthy debate about the significance of the award in the arbitration proceedings between Deutsche Telekom ("DT") and India of 13 December 2017 (the "DT Award") for the determination of propositions concerning essential security interests. This Court is of the view that the DT Award offers no support for India's propositions. The fact that the DT arbitral tribunal found that it was entirely competent to rule on the dispute opposing DT and India together with the fact that the wording of the arbitration clause and the essential security issues in the applicable bilateral investment treaty are identical to those in the BIT, constitute a major contraindication denying that arguments may be derived from the DT Award so as to support India's position. This Court concurs with Devas et al. that the circumstance that the DT Tribunal ruled on essential security issues under the heading of preliminary objections (DT Award, chapter V) does not, without more, mean that these issues touch on the jurisdiction of the arbitral tribunal given that matters other than issues of jurisdiction may be ranked as preliminary objections as well. In the DT Award, essential security issues were not ranked (or not explicitly ranked) as an issue of jurisdiction or as a threshold issue, in contrast to the pre-investment defence, a defence that India also put forward in the arbitration proceedings with DT.

4.46. This Court therefore concludes that the essential security issues raised by India cannot result in the placing of a limitation on the Tribunal's jurisdiction to hear the dispute opposing the parties. Given that the declaration of partial lack of jurisdiction from which India derives arguments that the Arbitral Tribunal paid heed to essential security issues when determining its own jurisdiction is not the subject of this action to set-aside, this Court will not adjudicate further on that which the Tribunal put forward as reasoning supporting its declaration of partial lack of competence. On the grounds of the foregoing alone

the set-aside sought cannot succeed, with the result that this Court will not broach that which the parties put forward in addition with respect to the criterion against which essential security issues are to be investigated, with respect to whether a declaration of partial competence (or of lack of partial competence) is possible and with respect to what degree the facts in this file provide support for the choice of the 60/40 allocation that was made.

Ground for set-aside II-2: The Tribunal did not keep to its mandate (Article 1065 paragraph 1 under c DCCP)

4.47. This Court refers to paragraph 4.19 (ground for set-aside I-2) for the applicable assessment criteria.

4.48. India has contended that a clearly demarcated dispute was put to the Tribunal. In the Arbitration Proceedings, India took the position that the CCS decision to reserve *all* space on the S-Band was directed at the protection of essential security interests. Yet in the Arbitration Proceedings, none of the parties took the position that the CCS decision was directed in part at the protection of essential security interests. Instead of inviting the parties to provide further information, the Tribunal decided 'in all reasonableness' to choose in favour of the 60/40 allocation. But there was no basis in either fact or law for such a decision. In finding that it enjoyed partial jurisdiction, the Tribunal ventured beyond the dispute opposing the parties and therefore did not keep to its mandate, so India contended.

4.49. This Court finds that with its 60/40 allocation the Tribunal did not award more than that which was sought and therefore cannot have ventured beyond the bounds of the legal dispute for that reason. In principle an arbitral tribunal is free to award less than that which was sought and therefore to find that it lacks jurisdiction to adjudicate on a portion of that which was sought. In these proceedings the question of whether in this case the Tribunal was entitled to take a decision of this nature divides the parties.

4.50. This Court concurs with India in its position that essential security interests enjoy a dichotomous character, in the sense that these are or are not present. The conclusion which India derives from this in this case, i.e., that the Tribunal did not keep to the mandate by finding that it enjoyed partial jurisdiction (or that it lacked partial jurisdiction) is not one that this Court endorses. India fails to recognise that in principle it is indeed possible to split up the frequency and then to use this for different – commercial and public – purposes. This possibility follows already from the Devas Contract, in which the parties agreed at the time to use ninety per cent of the frequency for civil/commercial purposes and the remaining ten per cent for military usage. The Tribunal's decision is therefore not a proportional application of the "essential security interests provision" but a complete application of this provision to a portion of the frequency at issue in the dispute. For that reason, the Tribunal remained within the bounds of the legal dispute. The question of whether the case file incorporates sufficient points of anchorage supporting the 60/40 allocation concerns the content of the Tribunal's decision and falls outside the scope of the restrained adjudication to be performed in the context of this action to set-aside.

4.51. In addition, this Court finds that on the basis of the factual material put before it the Tribunal came to the conclusion that 60% of the S-band was necessary for essential security interests. It has neither been claimed nor has it become apparent that, in making this determination, the Tribunal based this conclusion on facts that were not put forward by the parties. The very words 'in all reasonableness' that the Tribunal added when making the allocation, shows that the Tribunal made an allocation based on facts presented by the parties in line with the principles of reasonableness. The allocation made by the Tribunal and the question of whether a different allocation would be defensible (or can be defended better) falls outside the investigation which a court is under a duty to perform in the context of the set-aside sought.

4.52. This Court therefore concludes that there is no basis warranting the setting aside of the Partial Award because the Tribunal did not keep to the mandate with regard to essential security interests.

Ground for set-aside II-3: The Partial Award does not contain reasoning supporting various important findings (Article 1065 paragraph 1 under d DCCP)

4.53. This Court refers to paragraph 4.23 (ground for set-aside I-3) for the applicable assessment criteria.

4.54. In support of its claim, India has contended that the Tribunal found that reserving the S-band for military or paramilitary requirements to which the essential security interests clause applied, concerned other requirements of public interest. In the CCS decision no precise allocation was made between, on the one hand, the military or paramilitary requirements (a loss that did not call for financial compensation) and the other requirements of national interest, for which compensation indeed had to be offered. At paragraph number 370 of the Partial Award, the Tribunal found that the Indian authorities would not honour the full S-band requirement because "*all around the world governments are faced every year with very large demands for funds for various projects from their military establishment and, just as regularly, governments grant only a percentage of such requests*". Subsequently, at paragraph number 373 of the Partial Award, the Tribunal concluded that "*a reasonable allocation of spectrum directed to the protection of [India's] security interests would not exceed 60% of the S-Band spectrum allocation to [Devas et al.], the remaining 40% being allocated for other public interest purposes and being subject to the expropriation conditions under Article 6 of the Treaty*". This reasoning is, as India sees it, so flawed as to compel set-aside.

4.55. This Court is of the view that there is insufficient support to be found in the file for India's proposition that the Tribunal did not provide any reason whatsoever for its decision to come to the 60/40 allocation. At this point it is reiterated that a court is under a duty to exercise great restraint when adjudicating on a claim to set-aside on the basis of Article 1065 paragraph 1 under d DCCP; and may only proceed to set aside in egregious cases. In paragraph numbers 370 and 371 of the Partial Award (see paragraph 4.32), the Tribunal set out reasoning showing why, as it saw it, the frequencies claimed for military or paramilitary purposes would not be honoured in full. This reasoning, which, so this Court finds, cannot be equated with a lack of reasoning, then in part supplied a basis for its decision to come to the 60/40 allocation. This means that the Tribunal's decision is equipped with reasoning and a ground for setting aside the Partial Award for lack of reasoning is absent. The legal and factual validity of the reasoning falls outside the scope of adjudication by a court given that an action in set-aside is not designed as an appeal forum for arbitration proceedings.

Ground for set-aside II-4: The Partial Award and the way in came about breach public policy because the Tribunal breached India's fundamental right to adversarial proceedings (Article 1065 paragraph 1 under e DCCP)

4.56. This Court refers to paragraph 4.26 (ground for set-aside I-4) for the applicable assessment criteria.

4.57. India has taken the position that, when drawing up the Partial Award, the Tribunal came up with the 60/40 allocation between essential security interests and other public interests without the parties ever having argued in favour of such an allocation and without the parties having had the opportunity to express their views on such an allocation. This finding was therefore a surprise decision that none of the parties could have foreseen or that the parties could not have been expected to address in their pleadings or in other documents, whether or not addressed to the court.

4.58. As found in paragraph 4.26, the Tribunal did not rule in favour of a proportional application of essential security interests, but ruled that only one part of the S-Band was needed for military and paramilitary purposes, which purposes ranked as essential security interests and that the Tribunal lacked jurisdiction for that portion of the claim. In the Arbitration Proceedings, India contended that the entire S-band that was in dispute was needed for military and paramilitary purposes, while Devas et al. adopted

the contrary position. In paragraph numbers 370-373 of the Partial Award (see paragraph 4.32), the Tribunal, partially referring to Devas et al's contentions, accepted a part of India's defence challenging jurisdiction. A tribunal is at liberty to award less than that which was sought, all the more so given that heed was paid to the parties' positions in the reasoning supporting that determination. That none of the parties argued in favour of the 60/40 allocation selected by the Tribunal does not place an obligation on the Tribunal to hear the parties about this intended determination. The same applies to the case, as India argued, where an international arbitral tribunal declares itself to enjoy partial jurisdiction (or to lack partial jurisdiction) which in such a situation has never taken place previously.

4.59. The claim in set-aside on the grounds of breach of the *audi et alteram partem* principle is dismissed.

(III) Charge Sheet

Introduction

4.60. India has taken the position that various former directors and officers of Devas and of the Indian authorities have engaged in the commission of criminal acts. On 11 August 2016, CBI lodged a Charge Sheet. The following suspicions/accusations support the Charge Sheet: (i) avoidance of an ICC ruling concerning S-band usage; (ii) avoidance of the licence regime; (iii) conclusion of a contract with Devas, a company without a track record and without any capital of significance; and (iv) concealment of the existence of the Devas Contract in relation to the obtaining of approval for the construction and launch of GSAT-6 for Indian government officials. The Directorate of Enforcement of India's Ministry of Finance has lodged a separate charge. Devas et al. have rebutted the content of the Charge Sheet, in essence arguing that this concerns a trumped-up charge, the intention of which is to undermine the arbitral awards and to intimidate Devas et al.

4.61. Given that the Charge Sheet (11 September 2016) was only lodged shortly after the Tribunal issued the Partial Award (25 July 2016), the Tribunal was unable to pay heed to the Charge Sheet or its contents in its determination. The Partial Award therefore contains no findings or determinations relating to the Charge Sheet.

4.62. Given the content of the Charge Sheet India has prayed in aid some three grounds, these being (i) the lack of an arbitration agreement, (ii) the lack of reasoning and (iii) a breach of public policy, supporting the setting aside of the Partial Award. India has requested that the first and third ground for set-aside be stayed until an Indian criminal court has rendered a verdict on the Charge Sheet.

4.63. This Court dismisses this request for a stay. It has neither been claimed nor has it become apparent that at the time of the hearing, one and a half years after the Charge Sheet was lodged, a decision was taken to proceed to a prosecution in the light of the Charge Sheet and India has in no way indicated the time period within which such a decision may be expected. Nor has it been claimed nor has it become apparent that, should a decision to prosecute be taken, criminal proceedings will begin within a foreseeable period. Nor has India made clear over what period of time a decision by an Indian criminal court (that is, an irrevocable decision) may be expected. This means that the further course of the examination of the Charge Sheet is currently exceedingly uncertain. Under these circumstances the principles of due process bar a stay of the case. This means that this Court will adjudicate on the grounds for set-aside in the light of the current state of affairs.

Ground for set-aside III-1: the Tribunal lacked jurisdiction on the basis of Articles 1 and 2, BIT (Article 1065 paragraph 1 under a DCCP)

4.64. This Court refers to paragraph 4.11 (ground for set-aside I-1) for the applicable assessment criteria.

4.65. India has taken the position that agreements tainted by criminal acts are null *ab initio* under Indian law. If the Charge Sheet is confirmed in law, then this establishes the "tainted nature" of the Devas Contract, as a consequence of which the Devas Contract is null and the legal basis supporting the "investment" collapses. For both reasons, the Tribunal is not competent to adjudicate the dispute opposing Devas et al. and India and for this reason the Partial Award merits set-aside because of a lack of jurisdiction, so India contended.

4.66. It is not in dispute between the parties that the Charge Sheet can only have legal consequences for the Devas Contract if this results in a (irrevocable) criminal conviction. The mere circumstance that a Charge Sheet has been lodged is still devoid of legal consequence. This means that as long as no court has issued a verdict, or an irrevocable verdict, about the Charge Sheet, the Devas Contract cannot be said to be null on the grounds of having been tainted by criminal acts.

4.67. If in the adjudication heed is also paid to the question of whether the Charge Sheet can lead to criminal prosecution, then this Court holds that it is relevant that the content of the Charge Sheet has been gainsaid, with reasoning, by Devas et al. In particular, Devas et al. have argued that neither Devas et al., nor its directors nor its officers, are mentioned in the Charge Sheet. In the hearing, India did not supply further substantiation supporting the Charge Sheet and did not gainsay the defence of Devas et al. Given this state of affairs, India has failed to supply a sufficiency of factual substantiation supporting its position that the Devas Contract is threatened with nullity. This holds with all the greater vigour given that India has failed to particularise the degree to which the accusations concern Devas et al. and its officers and to what degree these accusations then touch on the Devas Contract.

4.68. This Court therefore concludes that the Charge Sheet cannot at this point in time lead to an *ab initio* null Devas Contract and that India has provided an insufficiency of substantiation supporting its position that Devas et al. (or its directors and officers) engaged in the commission of criminal acts resulting in the nullity of the Devas Contract. This means that there now obtains a qualifying investment which enjoys BIT protection, including the rule with respect to arbitration set out therein. This means that there is a valid arbitration agreement and that the Tribunal was competent to hear the dispute opposing Devas et al. and India. Given that the claim has already foundered on this ground, the other submissions that the parties have put forward in the context of this ground for set-aside require no examination.

Ground for set-aside III-2: For an essential part, the Partial Award lacks all reasoning (Article 1065 paragraph 1 under d DCCP)

4.69. This Court refers to paragraph 4.23 (ground for set-aside I-3) for the applicable assessment criteria.

4.70. According to India, in its Partial Award the Tribunal paid no attention to India's argument that Devas had wrongly attempted to have it believed that it had the ownership and the right of usage of the intellectual property at the time of concluding the Devas Contract and that the Devas Contract was based on deception and therefore did not enjoy BIT protection.

4.71. This Court finds that lack of reasoning may also obtain where an arbitral tribunal has failed to examine the parties' essential propositions. India only set out its argument that there was deception with regard to intellectual property, an argument on which it bases its claim to set-aside, exclusively in footnote 228 of the Rejoinder. It has neither been claimed nor has it become apparent that this argument was advanced in other trial documents or otherwise in the Arbitration Proceedings. This Court concurs with Devas et al. that a proposition found exclusively in a single footnote was not presented as an essential defence and therefore does not place upon the Tribunal any duty to respond in its Partial Award to the defence, with the result that the absence of an explicit rejection does not constitute a ground for setting-aside.

Ground for set-aside III-3: In terms of content, the Partial Award breaches public policy (Article 1065 paragraph 1 under e DCCP)

4.72. This Court refers to paragraph 4.26 (ground for set-aside I-4) for the applicable assessment criteria.

4.73. In addition, referring to the content of the Charge Sheet, India has argued that the content of the Devas Contract breaches public policy. By ruling that there was indeed a valid contract, the Tribunal's finding breaches public policy and for this reason this Partial Award merits dismissal.

4.74. As already found in 4.63, it has not been established in law that there were criminal acts on the occasion of the genesis of the Devas Contract. Moreover, India has provided insufficient substantiation supporting the proposition that Devas et al., or its directors and officers, engaged in the commission of criminal acts. This causes the purported breach of public policy to lack a sufficient basis in fact. The claim seeking the setting aside of the Partial Award on the grounds of breach of public policy is dismissed.

Conclusion and costs

4.75. As none of the grounds for set-aside succeed, India's claim seeking the setting aside of the Partial Award is dismissed.

4.76. As the party against whom judgment has been given, India will be ordered to pay the costs on the side of Devas et al. These costs are quantified at € 619 on the grounds of the clerk's fee paid by Devas et al. and at € 7,712 (two points at € 3,856 according to rate VIII) as counsel's fee; thereby totalling € 8,331.

4.77. There is no ground for a separate order with respect to subsequent costs, given that the order with respect to costs also supplies executory title for these subsequent costs (compare Supreme Court 19 March 2010, ECLI:NL:HR:2010:BL 1116, NJ 2011/237). In line with the application, this Court will quantify the subsequent costs pursuant to the applicable statutory scale of costs.

5. The judgment

The District Court

5.1. dismisses the application,

5.2. directs India to bear the costs, quantified at € 8,331, as well as the subsequent costs still to be incurred, to be increased by € 82 in case of service, increased by the statutory rate of interest due as from 28 November 2018 until the date of complete repayment.

This judgment has been rendered by D.R. Glass, I.A.M. Kroft and R.C. Hartendorp and was pronounced in open court on 14 November 2018.